



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VIII

999 18th STREET - SUITE 500
DENVER, COLORADO 80202-2466

JAN 10 1992

Ref: SHWM-FF

Mr. Frazer Lockhart
Department of Energy/Rocky Flats Plant
Trailer 130A
P.O. Box 928
Golden, CO 80402

Dear Mr. Lockhart:

This correspondence is forwarded by the EPA and State of Colorado Project Coordinators in accordance with Part 36 of the Interagency Agreement (IAG) among U.S. Department of Energy, the State of Colorado and U.S. Environmental Protection Agency signed January 22, 1991. Please note however that the position forwarded by this letter is at the direction of the management of the Colorado Department of Health and EPA Region VIII.

We have received your October 1, 1991, letter responding to our September 17, 1991, and September 25, 1991, letters requesting information regarding FY-92 Rocky Flats IAG funding. We have also been informed that DOE does not intend to fully fund FY-92 activities intended to meet IAG requirements. We note that it appears you have not yet fully responded to EPA's request for information on alternative agency funding, as required by CERCLA s' 120(e)(3). Nonetheless, the information that you have provided suggests that DOE may not have fully complied with CERCLA s' 120(e)(5) (and possibly CERCLA s' 120(e)(3)) and may have violated the terms of the IAG. This letter details the possible IAG violations, informs you that EPA and CDH do not feel obligated to extend affected schedules, and provides notice that stipulated penalties may be assessed pending EPA and CDH's evaluation of DOE's ability to meet its IAG obligations, and pending our review of DOE's FY-93 funding request. In addition, we are considering other options pending our evaluation of DOE's commitment to its obligations within this agreement.

It appears from your response that DOE requested only \$50M from Congress for FY-92 IAG activities, despite DOE's projection that approximately \$114M would be necessary to cover IAG commitments (including solar pond activities). It also appears that DOE's recently released Five Year Plan does not reflect the funding levels necessary to implement the requirements and schedules of the IAG for FY-93, and may misrepresent the funding needs for FY-92. We also note that DOE intends to make up part of the FY-92 shortfall through use of FY-91 carryover funds. However, DOE still anticipates that the current funding will not cover approximately \$17M worth of FY-92 IAG activities. We

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further understand that DOE intends to avoid incurring the estimated \$17 million cost by deferring field work scheduled to begin during FY 92.

It appears that there is nothing in DOE's current Five Year Plan which reflects an effort to allocate FY-93 resources to make up for the FY-92 shortfall and the Five Year Plan's FY-93 funding levels are also significantly less than DOE has stated would be required to meet its legal obligations under the IAG.

In the IAG, DOE committed to "take all necessary steps and use its best efforts to obtain timely funding to meet its [IAG] obligations ... including but not limited to budget requests supported by DOE's Environmental Restoration and Waste Management Five Year Plan." (IAG Paragraph 250). DOE also committed that "the activities and related milestones in the Five-Year Plan shall be consistent with the provisions, including requirements and schedules" of the IAG. (IAG Paragraph 251). The IAG also provides that "DOE shall include in its Annual Report to Congress the specific cost estimates and budgetary proposals associated with the implementation" of the IAG. (IAG Paragraph 252).

In light of the above requirements of the IAG and in reliance on the information we have received from DOE, we have identified the following potential violations of the IAG:

1. DOE may have violated the provisions of Paragraph 250 of the IAG by failing to use its best efforts to obtain timely funding to meet its FY-92 IAG obligations. DOE may not have submitted a budget request to Congress sufficient to fully fund its IAG commitments, nor accurately described its IAG commitments in the Five-Year Plan; and
2. DOE may have violated the provisions of Paragraph 251 of the IAG by understating its FY-92 and FY-93 needs and thereby failing to ensure consistency between the Five-Year Plan and the IAG; and
3. DOE may have violated the provisions of Paragraph 252 of the IAG by understating the specific cost estimates and budgetary proposals associated with the implementation of the IAG in its Annual Report to Congress.

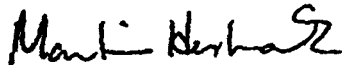
The IAG provides that EPA may assess stipulated penalties in the event that DOE "fails to comply with a term or condition of this agreement which relates to an interim or final remedial action." (IAG Paragraph 129). EPA and CDH feel strongly that DOE must comply with the terms of the IAG and DOE must ensure that adequate funding is available to meet its IAG obligations. DOE should also note that in accordance with the IAG for Rocky Flats, EPA may assess penalties for missed milestones in addition to any penalties that might be assessed for the possible violations discussed above. EPA is therefore reserving its right to assess stipulated penalties for the above noted possible

violations pending our evaluation of DOE's ability to meet its IAG obligations and our evaluation of DOE's FY-93 budget request, Annual Report to Congress, and subsequent Five Year Plan.

For FY-92, it is our belief that the appropriate funding level to support DOE's IAG commitments was not requested from Congress. Pursuant to the IAG, we are only obligated to revisit the IAG implementation plans if the funding shortfall is caused by Congress appropriating less money than was asked for in DOE's budget requests. Thus we believe we are not obligated to revisit implementation plans associated with the Rocky Flats IAG or the Five Year Plan. EPA and CDH's position to not revisit the implementation plans for the IAG does not, of course, preclude consideration of extensions where good cause exists, as defined in the IAG.

As noted above, the information submitted by DOE appears to support a finding that DOE has violated the terms and conditions of the IAG. If there is further information which DOE believes may cause EPA or CDH to reevaluate this finding, we welcome the submittal of such information. Please contact Martin Hestmark at 294-1134 or Gary Baughman at 331-4847 if you have any questions.

Sincerely,



Martin Hestmark, Manager
Rocky Flats Project
U.S. EPA



Gary Baughman, Unit Leader
Hazardous Waste Facilities
Colorado Department of Health